

Islamic Law in the Modern World

Nationalization, Islamization, Reinstatement

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Abstract

The essay provides a general account of some of the main changes that Islamic law has undergone since the late 19th century: the transformation of Islamic law from a jurists' law to a statutory law; the displacement of the *'ulamā'* as the exclusive interpreters of Islamic law; and the secularization and nationalization of Islamic law through the judicial practice of the Constitutional Court and civil courts in Egypt. Other issues include the impact of the West on Islamic law; the reduction of Islamic law in Turkey to the status of custom; the collapse of traditional family law and the *waqf* institution; the Islamization of custom in tribal societies; and the application of Islamic law in a non-Muslim state. In the conclusion, I assess the chances of reinstating Islamic law and Islamizing the statutory legal corpus based on the experience of Iran, the Sudan and Egypt.

Keywords

Western law – Turkey – Islamic law – jurists' law – *'ulamā'* – family law – *waqf* – custom and tribal customary law – legal methodologies – constitutions – Constitutional Court – judicial practice – Egypt – secularization of Islamic law – Islamization of statutory law – reinstatement of Islamic law – Iran – the Sudan – Israel – *ijtihād* – *maṣlaḥa mursala* – *siyāsa shar'īyya* – Saudi Arabia – Muslim Brothers – Ḥamās

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The purpose of this essay is to provide a general account of some of the main changes in Islamic law in the Middle East since the late 19th century, with special attention to its position in the state legal system. The main issues discussed are the transformation of the *sharī'a* from a jurists' law to a statutory law and the displacement of the *ʿulamā'* as the exclusive interpreters of the *sharī'a*, to the point that they have lost control of *sharī'* discourse; and the secularization and nationalization of Islamic law through the judicial practice of the Supreme Constitutional Court and the civil courts applying *sharī'* personal law in Egypt. Other issues discussed include the impact of the West on Islamic law, the abolition of the *sharī'a* in Turkey and its reduction to the status of custom, the collapse of traditional family law and the institution of *waqf*, the Islamization of customary law in tribal societies, and the application of the *sharī'a* in a non-Muslim state (Israel). In the conclusion, I assess the chances of reinstating the *sharī'a* as a jurists' law and Islamizing the statutory legal corpus, based on the experience of Iran, the Sudan and Egypt (since the 2011 Arabic Spring). The issues discussed reflect three different alternatives regarding the source of authority and the position of Islamic law in the state legal system: (1) secularization and nationalization of Islamic law; (2) Islamization of statutory law; and (3) reinstatement of Islamic law as a jurists' law.

Throughout the essay, I make occasional references to Jewish law – a jurists' law of a transcendental nature that experienced “closure of the door of law” – its integration in the Israeli legal system, its nationalization and the prospects for its reinstatement, in an effort to provide better insight into the status of the *sharī'a* in modern times.¹

1 The Impact of the West

Since the late 19th century Islamic law has experienced dramatic changes, many of them no doubt caused by the impact of the West. These changes have been so profound that Wael Hallaq, one of the most prominent and influential scholars of Islamic law in our generation, concludes categorically that “traditional *sharī'a* can surely be said to have gone without return.”² Apparently, Hallaq rules out the possibility of restoration of Islamic law as a jurists' law. Indeed, the legal impact of the West has been so great that Muslims call it “legal colonialism” (*isti'mār qānūnī*).³ Of course, other, internal factors have also affected Islamic law in modern times, although the Western impact has been the strongest

1 On Jewish law, see England.

2 Hallaq 2004, 42; cf. Shaham, 190-1.

3 E.g., Shalabī, 3, 183.

incentive for change. For instance, Saudi Arabia, which emerged from the Wahhābiyya, a puritan revivalist movement in the late 18th century, never experienced colonial rule; the Wahhābī movement regards the first century of Islam as a model to be imitated. Yet even the Saudi Arabian effort to adapt Islamic law to modern conditions has been influenced to a very large extent by its increasing contacts with the West.⁴

Broadly speaking, the profound impact of Western law on the Muslim world persisted even after the physical withdrawal of the Western powers. This applies to Anglo-Muhammadan Law, *droit musulman algèrien*⁵ and Dutch colonial law,⁶ following the withdrawal of Britain, France and the Netherlands from their respective colonies. The indirect impact of the West may be observed on the level of ideology in such matters as constitutional movements, secular nationalism, separation of powers, natural justice, equality before the law and legal precedent. Its direct legal impact can be detected in the Capitulations and the mixed courts; the importation of Western codes (modified to accommodate indigenous conditions) and methods of codification. Other manifestations of direct legal impact include the establishment, alongside the government, of a legislature and a judiciary modeled on Western patterns – such as a hierarchal appellate system, the collegial composition of the court, and the constitutional court.⁷ The desire – not yet fully satisfied – to eliminate Western influence plays a considerable role in the policy of nationalization of the law in independent Arab states. A Western-inspired legal system continues to function in some Arab countries.⁸

2 Abolition of the *Sharīʿa* in Turkey

The “Young Ottoman” constitutional movement and the ideological struggle between the Westernist, Islamist and Turkish schools of thought of the “Young Turk” movement in the 19th century – both under the impact of the West – prepared the ground for the complete abolition of *sharīʿa*.⁹ In 1928, secularism was established as a fundamental principle in the Constitution of the new republic.

4 Layish 1987, 292 col. 2.

5 On the first two legal systems, see Hallaq 2009, 377-9, 432-8; Schacht, 94-9; Coulson 1964, 171-2.

6 Hallaq 2009, 493-6; Hooker, 270-3.

7 Cf. Anderson, 34-8, 86-100; Coulson 1964, 149ff.; Layish 1991b.

8 Cf. Layish & Warburg, 78, 281.

9 Berkes, 201-18, and 337-46, respectively.

The *sharī'a* and *sharī'a* courts were abolished altogether, and radical reforms were introduced in the political system, *waqf*, language and education. The goal of these reforms was to replace the Islamic cultural heritage, of which the *sharī'a* constitutes a central component, with Western civilization. In 1926 the Swiss Civil Code was adopted and applied in matters of personal status, and in 2001 the principle of equality between spouses was introduced in Article 41 of the Constitution.¹⁰

Kemalism succeeded in removing Islam from the political establishment but failed to transform Islam into a personal belief system. It seems that not all Turks have internalized the secular revolution. Social norms and practices usually lag behind legal reforms imposed from above. Thus many Turks in both rural and urban areas continue to marry (including polygamous unions) in accordance with the *sharī'a*, and the government has been compelled over time to legitimize millions of children born of marriages performed according to the *sharī'a*.¹¹ In other words, the *sharī'a* has been reduced to the status of custom.¹² Until recently, the status of *sharī'a* in Turkey was strongly affected by the country's European orientation and by the army's position as guardian of the secular constitution. The referendum of 12 September 2010 endorsed the government's proposal to amend the Turkish constitution in an effort to achieve two goals: (1) to prevent the army from interfering in politics; and (2) to strengthen Parliament's control of the Supreme Court. This amendment was intended to enable the government to continue with its Islamist policy and, paradoxically, to increase Turkey's chances of admission to the European Union.¹³ In fact, by replacing the old military command with a new one, the government severely limited the army's ability to interfere in politics, thereby reducing the Kemalist secular legacy. There is evidence of increasing Islamization of the public sphere in education and religious ritual.¹⁴ At present, the main debate in Turkey is about the expansion of freedom of religion in the public sphere.¹⁵ It is likely, however, that the more Turkey moves away from Europe, the more concessions will be granted to the *sharī'a*.

10 Yilmaz, 118ff.; Koçak, 263.

11 Dirks, 34ff., 77-8; Hallaq 2009, 498; Yilmaz, 121-7; Koçak, 263.

12 Cf. Peters 2003, 91.

13 *Haaretz*, 13 September 2010.

14 Taşpınar; Atlas.

15 Koçak, 247, 267-8.

3 The Transformation of the *Sharī'a* from a Jurists' Law to a Statutory Law

The secularization of some Muslim states in the 20th century caused the *sharī'a* to lose its most salient features as a jurists' law. Parliaments employ a variety of methods to introduce legal reforms. These include procedural and criminal legislation that does not effect *sharī* substantive law; the eclectic expedient (*takhayyur*, selection, or *tafīq*, combining elements from various sources), according to which all schools of law are treated as one common source; and reinterpretation of the textual sources on the basis of utilitarian principles such as "public interest" (*maṣlaḥa*) and "necessity" (*ḍarūra*).¹⁶ By using these methods, parliaments seek to create the impression that the state is renewing the *sharī'a* from within without changing its traditional features. However, the application of these methods through state codification comes at a very high price: It has resulted in the transformation of the *sharī'a* from a jurists' law to a statutory law.¹⁷ Although the actual substance of the codes is based on the *sharī'a*, the statutory provisions have an autonomous existence that is based on state-imposed sanctions and – if applied in national or state courts – is subject to civil rules of evidence, procedure and interpretation.¹⁸

Codification has contributed to the nationalization of the *sharī'a*. Statutes are valid only within the framework of individual national-territorial states. Codification results in a complete departure from the *fiqh*, unless there is a provision to the effect that the doctrine of a specific *madhhab* may be invoked in the event of a gap in a statutory provision (see below). Over time, codification inevitably disrupts the *sharī* legal methodology (*uṣūl al-fiqh*) and positive law (*furū'*), as consolidated in each of the schools.

Another result of codification is the decline of religio-ethical sanctions as a method for shaping legal norms. A religio-ethical commandment with a sanction in the next world is irrelevant in a statute; it has no legal consequence unless it has been incorporated in criminal legislation.¹⁹ In fact, sections of the *sharī'a* that have undergone codification have become the domain of the secular professional lawyer rather than that of the traditional religious scholar.²⁰

16 Hallaq 2009, 447-9; Lombardi, 81ff.; Anderson, 42-82; Layish 1978, 263-77; Layish 2004, 90-1.

17 Peters 2003, 88ff.

18 Cf. Hallaq 2009, 449.

19 Layish & Warburg, 220ff.; Layish 1978, 264.

20 Cf. Coulson 1969, 100.

4 Dispossessing the 'Ulamā' of their Historic Role as Interpreters of the Sharī'a

As a result of codification, religious scholars have lost their historic role as the authorized interpreters and exponents of the *sharī'a* as well as their exclusive monopoly on the formulation of the law. The decline of the 'ulamā' has been accelerated by the nationalization of *waqf* properties that sustained their religious, political, economic and social status, as well as by the emergence of a new secular class of lawyers.²¹

As a result of the decline of the 'ulamā's interpretive authority, the domain of *sharī* interpretation has become widely accessible to individuals with no formal *sharī* education. *Fiqh* academies have emerged in the Middle East, and, recently, in Europe and the United States. In these academies, conservative jurists and modernist reformers attempt to create a new type of legal authority to promote their agendas. The resulting juristic discourse has contributed to a new globalism in Islamic law.²² From the traditional *sharī* perspective, laymen may not participate in *sharī* discourse. In many Muslim countries, however, the *sharī* establishment seems to have lost control of *sharī* discourse.²³ Of course, the participation of laymen in *sharī* discourse should be viewed as a very important social and cultural development; such a discourse may promote the equality of women by exerting pressure on parliaments to initiate liberal progressive legislation in the domain of family law. However, the modern interpretation of the *sharī'a* by laymen affects neither Islamic positive law nor its legal methodology.

5 Collapse of Traditional Muslim Family Law

The attempt to improve the status of women by means of the codification of family law has contributed to the conceptual collapse of traditional Muslim family law. The prohibition or abolition of polygamy and the curtailment of a husband's freedom of unilateral divorce, e.g., by transforming divorce into judicial dissolution, has undermined the patriarchal structure of Muslim family law. In 1963, Iraq introduced the Shī'ī system of order of priorities in succession, based on relationship (*qarāba*) with the deceased, according to which any lineal descendant – regardless of agnatic or cognatic affiliation – totally excludes all

21 Peters 2003, 93; Hallaq 2009, 500, 547; Cardinal; Baer, 91-2.

22 Cf. Ukeles.

23 Cf. Peters 2003, 91, 93-5; Hallaq 2004, 22; Layish 2013, 531; Vikør, 256-7, 261-2.

collaterals. The goal of the reform was to strengthen the rights of heirs within the nuclear family at the expense of heirs in the extended (or “outer”) family.²⁴ This reform, together with the obligatory bequest in favor of orphaned grandchildren – which is inconsistent with the Islamic rule of degree²⁵ – was introduced in several countries, and has undermined the patrilineal pattern of Muslim family law. Due to the sporadic nature of reformist legislation, which is clearly inspired by Western norms, the traditional balance in Muslim family law between the rights and duties of spouses has been altered without achieving a new balance suited to the conditions of modern society.²⁶

6 Privatization and Nationalization of the *Waqf*

The *waqf* or religious endowment, one of the most important institutions of traditional Muslim society, has undergone radical changes since the 19th century. Traditionally, the family (*dhurrī* or *ahlī*) *waqf* was a means to prevent the fragmentation of the agnatic patrimony through inheritance; and the charitable (*khayrī*) *waqf* was the main vehicle for the provision of public services such as social welfare and religious education by the ruling elite (sultans and local governors). Broadly speaking, in the absence of state regulation in this domain (beyond care for the poor by means of the *zakāt* system), it was the elite who established *waqfs*, using their own private property to this end. The reforms sought to restore full ownership of endowed property to the private and public economic spheres.²⁷ The family *waqf* was abolished in Syria, Egypt and Libya. In Egypt, agricultural lands that had been endowed for charitable purposes were nationalized and allocated to the peasants within the framework of agrarian reform.²⁸

7 The Islamization of Custom

Custom (*‘āda*, *‘urf*) has made an important contribution to the development of Islamic law, both as a source that provides legal norms for Islamic positive

24 Coulson 1971, 108-10, 141-2.

25 Among relatives of the same class (*tabaqa*), the nearer in degree to the deceased excludes the more remote; thus any surviving son excludes the orphaned grandchildren of any other son who predeceased the grandfather (Coulson 1971, 33-4).

26 Layish, 2000a; cf. Hallaq, 2009, 450-71.

27 All schools of law (with the exception of the *Mālikīs*) hold that an endowment is inalienable in perpetuity; see Peters 2000, 67.

28 Layish 2000b; Hallaq 2009, 471-3.

law and as an independent material source (*aṣl*) for creating legal norms. Although Muslim jurists never formally recognized custom as a source of law, it approximated this status in the Ḥanafī school.²⁹ By invoking the idea of necessity (*ḍarūra*), the Ḥanafī jurist Ibn ʿĀbidīn (d. 1836) elevated both universal and local custom to the status of a legal source. In this way he prepared the ground for the recognition of custom as a source of law in the Mecelle (1876), which, though based on Ḥanafī doctrine, is a product of statutory codification.³⁰

Bedouin customary law has been very strong not only in tribal societies but also among peasants.³¹ The earliest *qāḍīs* in the Umayyad administration filled local practices and customs with Islamic religious and ethical norms³² (for example, collective accountability of the blood-money group, *ʿāqila*, for a homicide was replaced with individual accountability of the perpetrator). The Islamization of tribal customary law has continued in modern times. It is most pronounced in the domains of private property, marriage and family, but also in inheritance, contracts and obligations, homicide and bodily harm. The main agents of Islamization are the *qāḍī*, the marriage solemnizer (*ma'dhūn*), the *muftī*, and the civil court that applies the Mecelle (or a civil code based on the Mecelle). Tribal customary law is yielding ground to Islamic law on *its own territory*, i.e., in the domain of the tribal *qāḍī* (*ḥakam*, *muḥakkam*). However, the Islamization of tribal custom has not left a mark on either Islamic law or its methodology; its only result has been the emergence, in the tribal judiciary, of a hybrid version of a realistic, pragmatic Islamic-customary law, outside the control of the *ʿulamāʾ*. This development, in turn, has been instrumental in bringing the Bedouin within the orbit of conventional Islam.³³

8 Modernists and New Legal Methodologies

Classical legal methodology (*uṣūl al-fiqh*) has survived almost intact into modern times. Since the late 19th century, the *ʿulamāʾ* increasingly have worked to update legal methodology so that Islamic law might be adapted to contemporary conditions. There have been sporadic attempts to create new legal methodologies. Hallāq classifies these legal methodologies into two major categories: religious utilitarianism and religious liberalism. This division is based on con-

29 Libson, 887b.

30 Hallāq 2002, 53, 55, 61.

31 Cf. Stewart 2000; Stewart 2012.

32 Schacht, 27.

33 Layish & Shmueli; Layish 1991a; Layish 2002; Layish 2005; Layish 2008b; Layish 2011; cf. al-Atawneh 2009, 221ff.

tent analysis, regardless of the religious or secular background of the promoter of the methodology: Religious utilitarians use the doctrine of *maṣlaḥa* or “public interest” as the main instrument for reform, while religious liberals interpret textual sources in the light of changing circumstances.³⁴

The Western-oriented Modernist movement, headed by Muḥammad ‘Abduh (d. 1905), is perhaps the most important attempt to date to reshape the *sharī‘a* from within and to adapt it to changing conditions. Muḥammad Rashīd Riḍā (d. 1935), a scholar of a Syrian origin and ‘Abduh’s disciple, assumed that this goal could be achieved by applying the doctrine of *al-maṣāliḥ al-mursala*, lit. “benefits that are set free, independent,” in the sense that they are not addressed in the Qur’ān or *sunna*. According to this doctrine, in the absence of rulings in the Qur’ān or *sunna* for adapting the *sharī‘a* to modern conditions, new rules may be derived by means of analogical reasoning (*qiyās*) that takes into account public interest considerations. To this end it is necessary to extend the criterion of unattested suitability (*munāsaba mursala*), a method that identifies the “efficient cause” (*‘illa, ratio legis*) on the basis of an unambiguous argument. In other words, it is necessary to identify in the textual sources the attribute that is common to both the new case and the original case.³⁵ The doctrines of “necessity” (*ḍarūra*) and “ease” or “leniency” (*yusr*) also play an important role. The Modernists failed, but they contributed, albeit unintentionally, to the disintegration of traditional legal theory, on the one hand, and to the preparation of the ground for statutory codification of the *sharī‘a*, on the other.³⁶

9 Article 2 of the Egyptian Constitution and a Theory of Islamic Law

Is the attempt by the Egyptian Supreme Constitutional Court [SCC] to “Islamize” statutory law a unique phenomenon in Islamic contemporary legal history? Lombardi argues that Article 2 of the 1971 Constitution was adopted in an attempt to forge “an official theory of Islamic law” that would bolster the government’s legitimacy in the face of Islamist opposition. The Article provides, *inter alia*, that “the principles of *sharī‘a* shall be a [*the*, according to the 1980 Constitution] chief source of legislation (*maṣḍar ra’īsī li’l-tashrī‘*).” The goal of this article is to ensure that statutory legislation is compatible with *sharī‘* norms. Article 2 does not establish any criteria for identifying and implementing *sharī‘*

34 Hallaq 1997, ch. 6.

35 Hallaq 1997, 83-4, 88-9, 112; cf. Opwis 2005, 210-11. For further discussion, see below, 293.

36 Kerr, 67ff., ch. 6, esp. 195ff.; Layish 1978; Hallaq 2009, 501-8; Opwis 2005, 220-2; Lombardi, 73-6; cf. Peters 1988, 231; Vikør, 58-60, 67-9.

norms,³⁷ thus creating legal uncertainty when the validity of a statutory provision is challenged on the ground of incompatibility with non-codified *sharī'a*.³⁸

Referring to SCC judicial practice,³⁹ Lombardi argues that the Court has developed a new liberal theory of Islamic law that combines the vocabulary and concepts of classical and modernist doctrines. According to this theory, the legislature and the SCC are required to identify both “universal roots” (*al-uṣūl al-kullīyya*), the authenticity and meaning of which are definitive and may never be violated, and “general goals (*al-maqāṣid al-āmma*) of the *sharī'a*,” that is, public interest and necessities, such as the protection of religion, life, reason, progeny and property, support for which may be found in the *ḥadīth*. *Ijtihād* is permitted only in cases in which the authenticity and meaning of the “universal roots” are presumptive (*ẓaniyya*). The SCC is authorized to review the Parliament’s legislation in light of the aforementioned principles. Lombardi concludes that SCC interpretation of the *sharī'a* has reinforced liberal constitutional doctrine, particularly in the area of women’s rights; moreover, it has succeeded in shaping an official legal methodology applied by liberal justices who are “committed to democracy and human rights.”⁴⁰

Both the SCC and the Supreme Administrative Court [SAC] interpret the “principles of the *sharī'a*” restrictively: rules explicitly derived from textual sources cannot be subjected to new interpretation; other rules may be subjected to new interpretation, provided the result is consistent with the goals of the *sharī'a*. The SCC ruled that consistency with the *sharī'a* should not apply retroactively to laws promulgated prior to 1980. To date, only family law has been “Islamized” by means of codification of the *sharī'a*; in other domains, the law is regarded as “Islamic” by virtue of a statement that it is “not contradictory to *sharī'a* principles.”⁴¹

The SCC’s public policy is based on a purely secular doctrine.⁴² The judges assume that their application of Article 2 is in conformity with Egyptian constitutional law. The judges are trained in civil and constitutional law and, for the most part, have no formal education in *fiqh*. The SCC issued a decision specifying that any civil judge presiding in a national court may derive general principles from *sharī'i* sources.⁴³ Apparently, even a judge who is not trained in

37 Lombardi, 123-5, 129, 135; cf. Hallaq 2009, 479-80; Peters 2003, 91.

38 Cf. Peters 1988, 236.

39 Lombardi, Ch. 11, 200ff.; cf. Bälz, 231-73; Dupret, 136-43; Peters 1988, 240ff.

40 Lombardi, 140-1, 174, 178-80, 184, 188-92, 195, 272, 274; cf. Shaham, 176-7.

41 Berger & Sonnelveld, 52, 64, 70, 73, 84-5.

42 Lombardi, 128.

43 *Ibid.*, 183, 188; Hallaq 2009, 480-1; cf. Peters 1988, 242; Dupret, 129ff., 136-43.

the *sharī'a* may interpret the *sharī'a*. From the traditional *sharī* point of view, a layman may not interpret the *sharī'a*.

The Islamization of statutory legislation by means of codification of the *sharī'a* in the light of liberal constitutional principles is clearly an important landmark in Egyptian legal history; it has been very helpful in creating a national consensus and legitimacy for the Egyptian government.⁴⁴ However, this legal experiment has taken place outside the framework of the history of Islamic legal theory. Although the '*ulamā*' of al-Azhar participate in the preparation of draft codes for legislation,⁴⁵ there can be no doubt that Parliament is the source of sovereignty that determines the basic legislative norms and defines the space allowed for application of the *sharī'a*.

10 Nationalization of *Sharī* Personal Law through Civil Judicial Practice

Another important landmark in modern legal history was the application of family law in civil courts following the abolition of the *sharī'a* courts in Egypt, Tunisia, Libya and Sudan. In Egypt, the *sharī'a* courts (as well as Christian and Jewish religious courts) were abolished in 1955; their jurisdiction in matters of personal status (and *waqf*) was transferred to national civil courts, operating under the supervision of the Court of Cassation. Some *qāḍīs* were integrated into the national civil courts, mainly in lower instances. The civil courts now apply codified *sharī* personal law in accordance with civil rules of evidence, procedure, and interpretation. If there is a gap in a statutory provision, the civil judges, most of whom have no *sharī* education, base their decisions on the prevailing Ḥanafī doctrine. The judicial practice of the Court of Cassation in matters pertaining to *sharī* doctrines provides neither legal reasoning nor reference to decisions of the *sharī'a* courts or *fiqh* doctrine. Doctrines of schools other than the Ḥanafī are not mentioned, unless these doctrines have been incorporated in a statutory code.⁴⁶

44 The 1980 Israel Law of Legal Foundations provides that in the event of a gap in a statutory provision, the judiciary must apply the "heritage of Israel" (i.e., Jewish law), alongside universal principles such as freedom and justice. This provision is intended to satisfy the religious parties. The insertion of *halakhic* doctrines (*ḥaqīqa datit*, literally, "religious legislation") into Knesset legislation is fairly common; Jewish law, however, has undergone no statutory codification. In Orthodox religious discourse, the integration of Jewish elements into statutory legislation is mostly regarded as a distortion of Jewish law.

45 Lombardi, 135; cf. Shaham, 182-4.

46 Naveh 1997, 374, 384-8, 398; Naveh 2002, 16-21.

The application of *sharʿī* personal status law, whether codified or uncoded, by civil courts is an important development in Egyptian legal history that has contributed to the nationalization of the *sharʿa*. Civil adjudication takes place under the supervision of the SCC and outside the control of the *ʿulamāʾ*. Hence it should be evaluated in an extra-*sharʿī* context.

11 Reinstatement of the *Sharʿa*

Beginning in the last quarter of the 20th century the *sharʿa*, particularly criminal law, has been reinstated in several Muslim countries. In the early 1970s Libya was the first country to introduce Qurʾānic punishments (*ḥudūd*) for usury and for the consumption and/or sale of wine.⁴⁷ In what follows, we will consider two different models of reinstatement.

The example of the Islamic Republic of Iran is unique.⁴⁸ The 1979 Constitution combines democratic and theocratic principles and institutions. The freely elected Parliament and presidency are subordinate to the clerical establishment. The clergy, as the official interpreters of the Constitution and the *sharʿa*, have had a broad mandate to manage state affairs, especially after Khomeini's death.⁴⁹

Khomeini's interpretation of the concept of the "Guardian Jurist" (*vali-ye faqih*) is the theoretical foundation of governance in the Islamic Republic. As the representative of the "hidden Imām," the Guardian Jurist is the "Chief Jurist" (*marjaʿ-i taqlid*, literally, the "source of imitation"), who functions as both the political and the religious ruler. He is the ultimate legal expert in charge of *ijtihād* and his legal opinions are binding.⁵⁰ Article 2 of the Constitution vests sovereignty in God alone and declares that divine revelation or God's justice is the source of legislation. The Parliament operates under the strict supervision of a statutory body of authorized interpreters of the *sharʿa*. The validity of legislative acts is subject to approval by the Council of Guardians, which is composed of twelve jurists, six of whom are appointed by the Supreme Leader, the highest Shīʿī authority in the country (he is appointed by the Assembly of Experts), while the other six are laymen nominated by the head of the judiciary

47 Layish 1991a, 10-12, and the references to Ann Mayer's articles.

48 Unless otherwise indicated, this section is based on Hallaq 2009a, 486-93.

49 Mir-Hosseini, 332-4, 364; Otto, 629.

50 In 1989, the constitution was amended so that the Guardian Jurist would no longer be the Chief Jurist, nor would he be the only individual tasked with exercising *ijtihād*. I am grateful to Ze'ev Maghen for this clarification.

and approved by Parliament.⁵¹ The Council may veto a statute on the grounds of incompatibility with the Constitution or the *sharī'a*, in which case the statute returns, though not automatically, to the Expediency Discernment Council, an administrative assembly that, since 1988, has served as an advisory body to the Supreme Leader. If there is a gap in a legislative provision, the judge's decisions must conform to the *fatwās* of learned jurists (Art. 167 of the Constitution). There is evidence that legal treatises and opinions issued by Khomeini and his disciples, jurists such as Hussein-Ali Montazeri, Seyyed Mohammad Hosseini Beheshti, and Morteza Motahhari, have led to changes in Shī'ī public law. These jurists used *maṣlaḥa* as the main instrument for reforms.⁵²

Statutes promulgated before 1979 that were not in conformity with the *sharī'a*, such as the Family Protection Law of 1967, were rescinded. However, for pragmatic reasons, most of the existing legal corpus has survived intact. On the other hand, statutes restoring *sharī* legal norms have been enacted. For example, usury was prohibited and Qur'ānic punishments (*ḥudūd*) and discretionary punishments (*ta'zīr*) were reinstated.⁵³

To sum up, Islamization of the law in Iran has two dimensions: statutory codification of the *sharī'a* under the control of the '*ulamā*', who enjoy veto power, and, to a lesser extent, renovation of the *sharī'a* by independent jurists. This combination makes the Iranian model unique in the Muslim world; at present such a combination is not found in any Middle Eastern country.

A second model for reinstating the *sharī'a* is found in the Sudan. This model is based on Ḥasan al-Turābī's legal methodology, which synthesizes classical legal theory and Western-inspired legal principles. The *sharī'a* has been reinstated through statutory codification, based mainly on the eclectic device (*takhayyur*). If there is a gap in an Islamic statute or in the Qur'ān or *sunna*, the Sudanese Judgments (Basic Rules) Act, 1983 authorizes the civil judge (*sharī'a* courts have been abolished) to exercise *ijtihād* on the basis of legal sources and principles, in the following order: consensus, analogical reasoning, public interest, judicial precedents (*sawābiq al-ʿamal al-qadāʾī*) in the Sudanese national courts, custom, and the English principles of natural justice (based upon moral rather than legal considerations or sanctions) and 'justice, equity and good conscience'.⁵⁴

During Numayrī's reign (1969-85), most judges in the civil courts interpreted statutory provisions of Islamic codes in a manner consistent with the *sharī'a*.

51 Mir-Hosseini, 333.

52 I am grateful to Ze'ev Maghen for this information. Cf. Hallaq 2009a, 489, 492.

53 Cf. Vikør, 269-73.

54 Layish & Warburg, 76-7, 79ff. 199, n. 166 (definitions of the legal terms); Layish 2013, 518ff.

Moreover, they consulted the Qur'ān and the *sunna* in cases in which explicit statutory provisions dealing with the case under review were available. The Sudanese version of judicial *ijtihad*, based on a mixture of Islamic and Western legal sources and principles, was reduced to judicial discretion. The doctrine of public interest was elevated, in practice, albeit not formally, to an independent source of law. Especially in lower instances, judges associated with the Muslim Brotherhood expedited the process of "Islamization" of the subject matter and public morality. The Supreme Court was attentive to the judicial practice of Western countries.⁵⁵

12 Application of the *Sharī'a* in a non-Muslim Territory

Applying the *sharī'a* in a non-Muslim territory involves ethical and legal hardship because of the traditional dichotomy between "Abode of Islam" and "Abode of War."⁵⁶ Following the collapse of the Ottoman Empire and the establishment of the British Mandate, Palestine ceased to be part of a Muslim territory.

Israel is a unique instance of the application of the *sharī'a* in a non-Muslim territory.⁵⁷ The Knesset (Parliament) has attempted to replace both the Ottoman-Muslim and the English legal heritage with legislation that is inspired not only by universal liberal, humanistic and democratic values, but also by Jewish law.⁵⁸ Until 2001, the Ottoman *millet* system remained virtually intact in domains pertaining to communal organization and the judiciary. Thus *sharī'a* courts retained exclusive jurisdiction in virtually all matters of personal status (excluding succession) and *waqf*, while Rabbinical and Christian courts enjoyed exclusive jurisdiction only in matters of marriage and divorce. Since 2001 the civil family courts have had the same jurisdictional authority as that of the *sharī'a* courts, except in matters relating to marriage and divorce, which have been left within the latter's exclusive jurisdiction.⁵⁹ The 1917 Ottoman Family Rights Law, based mainly on Ḥanafī doctrine, is still applicable. The Knesset has intervened, through substantive legislation, in matters such as custody, guardianship, property relations between the spouses, and maintenance for relatives other than the spouse and minor children. However, in matters pertaining to *sharī* permission for, or prohibition of, marriage and divorce, the Knesset has used criminal sanctions that do not affect *sharī* substantive law. The *sharī*

55 Layish & Warburg, 263-74.

56 Cf. Abou El Fadl 1994.

57 Unless otherwise indicated, this section is based on Layish 2006.

58 Layish 2008a, 129ff., 144-5.

59 Shahar, 205, 207, 211.

judiciary has been integrated into the state judicial system and is subject to the supervision of the Supreme Court [SupC] in its capacity as the High Court of Justice [HCJ]; if a *qāḍī* ignores a statute explicitly addressed to religious courts, the HCJ is authorized to intervene.

In the absence of official *muftīs*, *qāḍīs* in Israel adapted the *sharīʿa* to changing conditions by holding periodic conferences (until the early 1970s) to discuss reform in judicial practice, mainly by enlisting elements from schools other than the Ḥanafī, and by handing down liberal decisions based mainly on the doctrine of public interest and by judicial decrees (*marsūm qaḍāʾī*) issued by the President of the Sharīʿa Court of Appeals [ShCApp].⁶⁰ The ShCApp has been heavily influenced by the SupC's jurisprudence. Thus it has adopted the concepts of "natural justice," "the best interest of the child" and "the right of standing in court," while attempting to Islamize these concepts by enlisting support for them in *sharīʿa*.

The *sharīʿa* is applied in the civil courts in the light of Israeli principles of law and rules of evidence and procedure. As a result an Israeli version of Islamic law has emerged that resembles in some respects the Anglo-Muhammadan Law in British India (which existed from 1772 until 1950). The SupC has created new civil legal norms that are not consistent with Islamic law, such as "civil paternity" based on DNA testing (1995).

Until the early 1970s *qāḍīs* did not hesitate to apply Knesset legislation. Some *qāḍīs* relied on it explicitly in their decisions, adopting its legal norms even when these were not consistent with *sharīʿi* norms. Thus some *qāḍīs* displayed a keen awareness of the Knesset prohibition on divorce against the wife's will or the prohibition of polygamy, and they would warn the husband not to commit a criminal offense by divorcing his wife against her will or by taking a second wife or, if he did, would alert the wife to her right to bring a criminal charge against her husband. Some *qāḍīs* welcomed Knesset penal legislation in matters of marriage and divorce, on the assumption that penal sanctions would reinforce *sharīʿi* norms grounded in ethical sanctions. Moreover, some *qāḍīs* boldly called for secular legislation of a substantive nature to ensure the material support of a divorced woman, on the basis of the doctrine *siyāsa sharʿiyya*, which, under certain circumstances, acknowledges the ruler's right of legislation.⁶¹

60 Ibid., 200-1.

61 Layish 1975, 334-7. For further details on *siyāsa sharʿiyya*, see further below, 293. Support for the "jurisprudence of minorities" (*fiqh al-aqalliyāt*), an ideology designed to facilitate the integration of Muslims in non-Muslim states, is found in the Qurʾān, the *ḥadīth*, and legal doctrines such as public welfare, necessity, governance in accordance with the *sharīʿa*, the goals of the *sharīʿa* and facilitation (*taysīr*) of *fiqh* (March; Abou El Fadl 2005, chs. 10-11).

Since the early 1990s, however, there has been an increasing tendency in the ShCApp to avoid applying Israeli statutes, even if explicitly addressed to religious courts, and to base the *sharī'a* courts' decisions on Qur'ān, *sunna* and *fiqh* doctrine. This tendency is inspired by the Islamic Movement, which calls for self-governance of the Israeli Palestinians in an attempt to regulate Muslim affairs independently of the state legal system.⁶²

13 Is There Any Possibility of Restoring the Authority of the *Sharī'a*?

Abdullahi Ahmed An-Na'im argues that the transformations occasioned by European colonialism are so profound and so deeply entrenched that restoration of the traditional *sharī'a* is not a realistic option. In his view, "*Sharī'a* principles can and should be a source of public policy and legislation, subject to the constitutional and human rights of all citizens, men and women, Muslim and non-Muslim, equally and without discrimination."⁶³ As noted, Hallaq categorically rejects the possibility of the reinstatement of traditional *sharī'a*. In his view, the only relevant question today is whether it is possible to Islamize the entire body of European codes that have been adopted by Muslim countries. To this end, he argues, an alternative legal methodology is required, similar to the methodologies developed by the Egyptian jurist Muḥammad Sa'īd 'Ashmāwī and the Pakistani scholar Fazlur Rahman (d. 1988).⁶⁴

In my view, "Islamization" of Western-inspired codes is promoted for the sake of the state's internal, secular policies rather than for the sake of God or religion; the state enlists the symbolic value of the *sharī'a* as part of the Islamic and national cultural heritage⁶⁵ to satisfy the Islamist opposition. The main problem is that Islamization is carried out by agents other than the *'ulamā'*. Thus 'Ashmāwī, although well-versed in the *sharī'a*, reflects on it from outside as a lawyer. The same holds for Fazlur Rahman, who took into account the social, economic and political conditions of Arabia at the time of the emergence of Islam. Hence, one cannot escape the conclusion that the legal methodologies for the Islamization of the statutory legal corpus developed by 'Ashmāwī and Rahman are not relevant from the point of view of the *sharī'a*.

It is too early, however, to conclude that the *sharī'a* is doomed to extinction. The survival or revival of the *sharī'a* depends on the ability of highly motivated,

62 Shahar, 210; Abou Ramadan, 84; cf. Stern 2007, 35.

63 An-Na'im, 334, 337.

64 Hallaq, 2009, 522, 527; cf. Shaham, 190-1.

65 Cf. Dupret, 126ff.

determined *'ulamā'* to formulate a new legal methodology, to exercise *ijtihād* and to Islamize the legal corpus.⁶⁶ The issue is not only the *technique* used for exercising *ijtihād* but also, and mainly, the *source of authority and legitimacy* – God or human beings – that sanctions the use of this technique. In other words, from a traditional *shar'ī* perspective, only qualified *'ulamā'*, as authorized interpreters of the will of God, are endowed with legitimacy to propose new legal methodologies; the secular legislator and the civil court are not qualified either to exercise "*ijtihād*" or "Islamize" the legal corpus, even if they enlist *shar'ī* doctrines to this end; from the *shar'ī* point of view, such legal experimentation is meaningless.⁶⁷

The ability of contemporary *'ulamā'* to Islamize foreign laws is limited in comparison to that demonstrated by *'ulamā'* during the formative period (between the mid 8th and late 9th centuries CE). The very existence of a well-established legal theory that has developed gradually over centuries restricts the scope of maneuver in modern times. However, there may be still enough space for contemporary *'ulamā'* to demonstrate legal creativity. Whereas Muḥammad 'Abduh was part of the religious establishment, his successor as leader of a revival movement may well emerge from outside that establishment, in the best tradition of Islam. Although higher institutions for *shar'ī* studies, such as al-Azhar, have lost their monopoly over *shar'ī* learning,⁶⁸ there are still independent *'ulamā'*, such as Yūsuf al-Qaradāwī, whose legal authority and charisma are fully accepted across the Muslim world. The possibility that someone will come forward with a coherent and comprehensive legal methodology, in an attempt to adapt the *shar'ī'a* to modern conditions, cannot be ruled out.⁶⁹

The main tools available for the revival of the *shar'ī'a* as a jurists' law, and for the *'ulamā'* to Islamize the statutory legal corpus, are the two related doctrines of *maṣlaha mursala* and *siyāsa shar'īyya*.⁷⁰

66 Layish 2004, 108.

67 Prof. Izhak Englard, former Director of the Institute for Jewish Law at the Hebrew University and retired Justice of the Israeli Supreme Court, categorically dismisses the possibility of the revival of Jewish law within the state legal system (personal communication, 5 January 2010). Prof. Yedidia Stern of Bar Ilan University Law School and Vice President of Research at the Israel Democracy Institute, suggests that a group of independent jurists who are recognized as outstanding scholars in Jewish law should adapt Jewish law to present-day conditions; he hopes that the Knesset and the state judiciary will apply the adapted Jewish law *voluntarily* (Stern 2007, 52-6).

68 Cf. Shaham, 182-3.

69 Cf. *ibid.*, 180-1, 184.

70 Friedman, 215; cf. al-Atawneh 2001, 61.

(1) Public interest (*maṣlaḥa mursala*)⁷¹ can provide a justification for any reform needed to adapt the *sharīʿa*, in the domain of private and personal law,⁷² to modern conditions, provided the reform does not explicitly contradict fundamental principles of the *sharīʿa*.⁷³ In the teachings of Modernists, *maṣlaḥa mursala* is vague and abstract with no criteria for its application. On the face of it, Riḍā's doctrine of *maṣlaḥa mursala*, based in natural law, which guides human conduct independently of any source of law, has been reduced to pure utilitarianism.⁷⁴ This, however, does not imply that any benefit under any circumstance is justified. For instance, *maṣlaḥa mursala* may not be applied in matters of worship and religious ritual,⁷⁵ nor may it contradict the "goals (*maqāsid*) of the *sharīʿa*" (such as the protection of religion and life). The discretionary right to apply the doctrine is vested in the judiciary. One assumes that *qāḍīs* will define *maṣlaḥa* in positive terms or set limits to its application in accordance with *sharīʿ* principles of law and in accordance with their social philosophy, which guides them in daily practice, subject to the aforementioned reservations.⁷⁶

(2) The classical doctrine of *siyāsa sharʿiyya* (lit. "governance in accordance with the *sharīʿa*") acknowledges the ruler's right, in the event of a gap in the Qurʾān, *sunna* or *fiqh* doctrine,⁷⁷ to supplement the *sharīʿa* with his own legislation, taking into account public interest.⁷⁸ In fact, the doctrine provides *sharīʿ* legitimacy for statutory legislation. Since early ʿAbbāsīd times administrative justice has derived its legitimacy from this doctrine.⁷⁹ At the present time, the doctrine can be used to adapt the *sharīʿa* to changing circumstances and to Islamize the legal corpus that has accumulated since the second half of the 19th century, especially in the areas of criminal and fiscal law. Statutes that are compatible with the *sharīʿa*, or at least not explicitly repugnant to it, can be absorbed within the *sharīʿ* corpus. The *sharīʿ* domain of *muʿāmalāt* (pecuniary transactions), which has a technical, secular nature, can easily be reconciled with statutory legislation.

71 For a definition, see above, [284].

72 Cf. Friedman, 218.

73 Khadduri; Opwis 2005, 197ff.; Opwis 2010, Index, s.v. legal change; cf. Layish 2013, 524-5.

74 Hallaq 1997, 214ff.; cf. Layish 1978, 270-1; Shaham, 176.

75 Hallaq 1997, 218-19.

76 In those countries in which *sharīʿa* courts have been abolished, some kind of supervision is required to ensure that the doctrine of public welfare is properly applied in the light of the principles of the *sharīʿa*.

77 Friedman, 218ff.

78 Vogel 1997, 694ff.; cf. Schacht, 54.

79 Schacht, 54.

There is ample evidence to suggest that public interest and *siyāsa sharʿiyya*, alongside other doctrines and *sharʿi* mechanisms, play a substantial role in contemporary legal history. Saudi Arabia is a case in point. Article 1 of the 1992 Basic Ordinance provides that the Qurʾān and the Prophetic *sunna* are the constitution of the kingdom and that the *sharʿa* is the basis of its legal system. The king may promulgate regulations (*nizāms*) in the event of a gap in the *sharʿa*. This authority, based on Ibn Taymiyya's theory of *siyāsa sharʿiyya*, is conditional upon the legislation's serving the public good and complementing, rather than contradicting, the textual sources.⁸⁰ The monarchy appears to be fully aware of the necessity to moderate Wahhābī doctrine in order to promote its political and economic relations with the West. Until recently, the *sharʿa* in Saudi Arabia had not undergone codification. Instead, the king designated six treatises by well-known Ḥanbalī jurists as authoritative sources to be relied on and to be applied in a specific order in *sharʿa* courts.⁸¹ The *ʿulamāʾ*, who serve in the political establishment, exercise control over the drafting of laws; they are consulted and often enjoy veto power.⁸² They are expected to provide the royal family with *sharʿi* legal opinions to legitimize the adaptation of the law to modern challenges.⁸³

In practice, the doctrine of public interest has been elevated to the status of a source of law.⁸⁴ Principles or legal maxims (*qawāʿid*) such as “no harm and no causing of harm” (*lā ḍarar wa-lā ḍirār*) guide *qāḍīs* in their decisions.⁸⁵ As Muhammad al-Atawneh has recently observed, the doctrines of public interest and necessity – two sides of the same coin – provide the theoretical basis for the legitimization of innovations in the fields of medicine and technology.⁸⁶

At present, the doctrine of *siyāsa sharʿiyya*, as transmitted to Wahhābī jurists from Ibn Taymiyya and Ibn Qayyim al-Jawziyya, provides legitimacy for hundreds of royal regulations issued in the event of a gap in a textual source.⁸⁷ Article 55 of the 1992 Basic Regulation stipulates that the King shall conduct the affairs of the state by *siyāsa sharʿiyya*, in accordance with the rules of Islam.⁸⁸

80 van Eijk, 140, 157-8, 172.

81 Layish, 1987, 280b; Vogel, 2000, 94; cf. Peters 2003, 87.

82 Vogel 2000, 175, 357-8. In 1992, Saudi Arabia codified its constitutional law in the Basic Ordinance; in 2001, it codified its criminal procedure law (Otto, 629).

83 Cf. Peters 2003, 90ff. Some *ʿulamāʾ* decline to issue the required legal opinions. Thus in the wake of the *qāḍīs'* tendency to ignore the King's regulations, other tribunals have been established to enforce these regulations (Vogel 2000, 175-6).

84 Vogel 2000, 343-4; Layish 1987, 285. Cf. Opwis 2005, 222.

85 Vogel 2000, 134-5.

86 Al-Atawneh 2010, 63-4, 139-40, 144; al-Atawneh 2011, 348f., 354-5.

87 Vogel 2000, 124, 173-5, 341.

88 Ibid., 295-6; Layish 1987, 284b.

This implies that *siyāsa sharʿiyya* is an independent source of law. Al-Atawneh argues that Saudi authorities use the traditional doctrine of *siyāsa sharʿiyya* as a “most important instrument for the preservation of the theocratic-legal nature, mainly the Wahhābī, of the country, simultaneously with the accommodation of the institutionalized normative system of a theocracy to the conditions of the country facing the challenges of modernity.”⁸⁹

Saudi *ʿulamāʾ* claim that the door of *ijtihād* was never closed.⁹⁰ However, innovative reforms, based on *ijtihād*, including judicial *ijtihād* by direct engagement with Qurʾān and *sunna*, have been rare.⁹¹ It is noteworthy that already at the beginning of the 11th century, *fiqh* specialists applied *siyāsa sharʿiyya* as an alternative to *ijtihād* in an effort to adapt Islamic law, especially public law, to the requirements of the contemporary Muslim community.⁹² As Vogel has observed, for the time being, the replacement of *ijtihād* with *siyāsa sharʿiyya* is being carried out without the cooperation of the *ʿulamāʾ*; this, in turn, may result in a shift in the primary agency determining law from the *ʿulamāʾ* to the political ruler, with all that this implies.⁹³

The freedom of Saudi *qāḍīs* to exercise *ijtihād* without being constrained by the doctrine of the Ḥanbalī school makes it possible for them to base their decisions on views favorable to innovative reforms derived from other schools, although this option has been applied only on a moderate scale.⁹⁴ Quite often the aforementioned doctrines and mechanisms are applied by means of collective *fatwās* issued by Saudi *ʿulamāʾ* operating on behalf of state institutions. This is a clear indication of the institutionalization of the *muftī* in modern times.⁹⁵

There is some evidence that *maṣlaḥa* and *siyāsa sharʿiyya* are being applied in Iran. In a *fatwā* issued in 1984, Khomeini authorized the Parliament to initiate legislation on the basis of necessity and public interest. He expressed his view that the Supreme Leader, who, according to the Constitution, is the highest Shīʿī authority, may suspend prayer or pilgrimage if he deems it to be in the public interest.⁹⁶ In cases in which legislative provisions are not consistent with the *sharʿa*, the Expediency Discernment Council seeks pragmatic solutions on the basis of public interest.⁹⁷

89 Al-Atawneh 2001, 57.

90 Vogel 2000, 78; al-Atawneh 2010, 64ff.

91 Vogel 2000, 122-3; Layish 1987, 292; van Eijk, 161.

92 Friedman, ch. 4.

93 Vogel 2000, 342.

94 Ibid., 107, 126; al-Atawneh 2010, 148.

95 Cf. Layish 1978, 265.

96 Mir-Hosseini, 335, 338, and the reference there to Arjomand.

97 Schneider.

14 The Muslim Brotherhood and the Reinstatement of the *Sharī'a*

The Muslim Brotherhood [MB], originally an activist group, represents not only a wide range of liberal professions, businessmen and teachers, but also some low-ranking '*ulamā'*' of al-Azhar. Most members are not trained in the traditional disciplines and do not have a clear, common legal methodology. Their interpretation of the Qur'ān and Prophetic *sunna* is influenced by the social and natural sciences, in an attempt to adapt Islamic law to modern conditions and to insure that religious morality lies at the center of the social order.⁹⁸

Ḥasan al-Huḍaybī, a lawyer with almost no *shar'ī* education, was elected as the Guide (*murshid*) of the Brotherhood in 1951. He advocated an Islamic state that would abolish all symbols of secular identity.⁹⁹ Unlike Ḥasan al-Bannā' and Sayyid Quṭb, he did not approve of a radical, activist policy against the regime, probably for pragmatic reasons. He argued that following the abolition of the caliphate in 1924, the concept of an Islamic state responsible for the collective application of Islamic law (*farḍ al-kifāya*) was replaced by the concept of individual responsibility for fulfilling *shar'ī* obligations (*farḍ al-'ayn*). This implies that the *sharī'a* can be applied without invoking the state's executive authority.

Al-Huḍaybī promoted Islamic governance (*ḥukūma*) and the reestablishment of the caliphate, with the *sharī'a* as its fundamental law, under the leadership of the *imām* or the ruler (*walī al-amr*). It is mandatory – he claimed – that the *imām* be well-versed in *shar'ī* studies and qualified to engage in *ijtihād*. Whereas the domain of religious observances (*ibādāt*) is immutable, that of pecuniary transactions (*mu'āmalāt*) may be adapted to changing conditions. He probably regarded the *shūrā* or consultative body as an alternative to a parliamentary system. Al-Huḍaybī's suggestion to subject state legislation to the control of a religious authority bears a resemblance to Khomeini's concept of the Guardian Jurist.

Yūsuf al-Qaraḍāwī's program for the adaptation of Islamic law to modern conditions is reflected in his views on *ijtihād*. Although he argues that the *sharī'a* is appropriate to any time and place, contemporary scientists and intellectuals agree that *ijtihād* is essential in order to update the *sharī'a*.¹⁰⁰ He quotes Sayyid Quṭb, who argued that contemporary Muslims are bound by the legal methodology of the *sharī'a* rather than by the positive law (*aḥkām*) and prin-

98 Hallaq 2009, 475-8.

99 The following survey is based on Zollner, 21, 104, 112, 116-18, 121-4, 127-30, 144-6, 151; and al-Huḍaybī, 73-4, 129-30, 133, 143ff.

100 Al-Qaraḍāwī 1998a, 10, 92.

ciples (*qawā'id*) of ancient times.¹⁰¹ *Ijtihād* is not only permissible (*jā'iz*) on the personal level, but also a collective duty, the fulfillment of which by a sufficient number of individuals exempts the rest of the Muslim community from the obligation to perform this duty.¹⁰²

Al-Qaraḍāwī distinguishes between selective (*intiqā'ī*) *ijtihād* and creative (*inshā'ī*) *ijtihād*: A jurist who engages in selective *ijtihād* uses the eclectic device (*talfīq*) from the legal heritage of *fatwās* and the judicial practice of all Sunni schools. A jurist who engages in creative *ijtihād* deduces (*istinbāt*) unprecedented and innovative rules.¹⁰³ Al-Qaraḍāwī is probably referring here to the distinction between *ijtihād* applied within a school of law and *ijtihād* that is absolute or independent (*muṭlaq*). He maintains that *ijtihād* may be applied on three levels: (1) legal opinion; (2) legal research (*baḥṭh*) conducted in universities and scientific conferences and published in academic journals; and (3) parliamentary codification (*taqnīn*). On all three levels, the *mujtahid* must be a qualified jurist who meets the “generally recognized *shar'ī* learning conditions” – at least those required for applying partial (*juz'ī*) *ijtihād* that does not relate to the entire case under review, as distinct from absolute *ijtihād*.¹⁰⁴ In other words, in addition to professional '*ulamā'*, independent academicians and legislators may also exercise *ijtihād*, on the condition that they possess the necessary *shar'ī* qualifications. *Ijtihād*, however, is not permitted in cases in which the *shar'ī* rules are of a definitive (*qaṭ'īyya*) nature, unless all other options for deriving law have been exhausted.¹⁰⁵

Al-Qaraḍāwī strongly recommends applying the doctrine of *maṣlaḥa mursala* at all levels of legislation (both private and public, including religious observances), legal opinion (*iftā'*) and adjudication (*qaḍā'*). He finds support for this position in textual sources, *shar'ī* principles and the “goals of the *shar'ī'a*” that serve the public interest.¹⁰⁶ Moreover, he recommends that the *shar'ī'a* should be codified without being bound to any particular school of law, as suggested by the doctrine of *siyāsa shar'īyya*. To this end he invokes Ḥasan al-Bannā', who argued that the opinion of a ruler is binding in the following cases: (1) to fill a gap in a textual source, (2) to interpret a text that has more than one interpretation, and (3) to address matters of public interest not dealt with in the Qur'ān

101 Ibid., 128.

102 Ibid., 16, 23, 103.

103 Ibid., 24, 26, 27, 37.

104 Ibid., 46, 50.

105 Ibid., 98-9.

106 Hallaq 2009, 104; see above, 285.

or *sunna*.¹⁰⁷ In other words, al-Qaraḏāwī advocates statutory codification of the *sharī'a* as a legitimate instrument for adapting the *sharī'a* to present-day conditions, provided that the legislators are qualified '*ulamā*'.

In recent years, the MB in Egypt has attempted to reinstate the *sharī'a* within the framework of a civil-law state. A draft of the Brotherhood's program of 25 August 2007 suggests re-constituting the Committee of Senior 'Ulamā' [CSU] as an independent advisory body to be elected from among the '*ulamā*' and assisted by experienced, knowledgeable advisers, who also possess expertise in the secular sciences. The *sharī'a* is to be applied in accordance with the will of the nation as expressed by members of a freely elected parliament. The parliament or, in its absence, the president of the state, must consult the CSU before promulgating a legislative act. If the *sharī'a* validity and meaning of a matter is equivocal, the parliament may ignore the CSU's view, provided that the parliament's decision is based on an absolute majority and takes into account public interest. However, if a *sharī'a* rule based on Qur'ān or *sunna* is unequivocal, the CSU's view is binding on the parliament.

While senior leaders of the Brotherhood regard the CSU as an advisory body whose sole purpose is to ensure the application of the *sharī'a* in accordance with Article 2 of the Egyptian Constitution, critics treat the program as an attempt to establish a religious Islamist state modeled on Iran.¹⁰⁸

In the wake of the 2011 Egyptian revolution and the fall of Ḥusnī Mubārak, the MB was legalized by the new regime and allowed to participate in the democratic process. In the general elections of June 2012, the Brotherhood's Ḥizb al-Ḥurriyya wa'l-'Adāla emerged as the dominant party in the country, and, together with the ultraconservative Salafis, Islamists now hold a large majority in the parliament. Muḥammad Mursī, chairman of the Brotherhood's party, is the first president after the fall of the old regime.

The new constitution, which was approved in a referendum on 25 December 2012, is more Islamic than any previous constitution in Egypt.¹⁰⁹ The articles pertaining to the *sharī'a* reflect a compromise between liberals and Salafis. Al-Azhar, whose independent status has been considerably strengthened by the constitution, is expected to supervise the application of Article 2 by the SCC. President Mursī has publicly committed himself to fully implementing the *sharī'a*. In practice, the MB has adopted a pragmatist stance – partial implementation of the *sharī'a* and compromise on matters of ideology – in order to maintain stability. Senior MB officials have declared that full implementation

107 Al-Qaraḏāwī 1998b, 104-6.

108 MEMRI, 25 November 2007.

109 Unless otherwise indicated, the survey of the draft constitution is based on Lavi.

of the *sharī'a* will begin once the public has been prepared for this. In January 2012, al-Qaraḍāwī suggested that the *sharī'a* should be implemented gradually and that “in the first five years there should be no chopping off of hands.” In his view, during this transitional period the public should be instructed about the detailed laws of the *sharī'a* and the economic and social problems of Egyptian society should be addressed and solved.¹¹⁰

Article 2 of the draft constitution reasserts that “the principles of Islamic *sharī'a*” are “the main source of legislation,” as in the 1980 Constitution. However, Article 219 clarifies: “[The expression] the principles of Islamic *sharī'a*” includes the entirety of legal indicants (*adilla*), principles pertaining to legal methodology, *fiqh* doctrine and valid textual sources recognized by the Sunni schools of law and the [Muslim] community.” The function of this article is to prevent a narrow reading of Article 2 by the SCC. Article 4 recognizes al-Azhar as the supreme religious body in Egypt, independent of the regime. CSU is to be consulted (*yu'khadh ra'y*) in matters pertaining to the *sharī'a* – a reference to the SCC's duty to consult with CSU before rendering its decisions. The formulation of this article suggests that the opinion of al-Azhar's scholars is not binding. In other words, the SCC has the discretion either to accept or reject the CSU's advice. At the same time, this article is meant to placate Salafis who want the *sharī'a* as a complete legal system to be the main source of legislation, with al-Azhar having the final say in determining whether statutory laws are consistent with the *sharī'a*.¹¹¹

Article 5 states that “sovereignty is for the people,” who are the “source of authority.” This formulation is contrary to the position of the Salafis, who insist that sovereignty is for the Lord. Article 6 states that “the political system is based upon the principles of democracy and *shūrā* [the classical consultative institution].” This formulation represents an attempt to please both liberals and Salafis.¹¹²

On 2 June 2013, the SupC dissolved the Shūrā Council (the upper house of Parliament) on the ground that it was elected illegally. The SupC also dissolved the committee that had drafted the constitution.¹¹³ Early in July 2013, when this essay was submitted, the Egyptian army stripped President Mursī of his power

¹¹⁰ Al-Qaraḍāwī 2012.

¹¹¹ Abdel Kouddous.

¹¹² For an English translation of the draft constitution, published in *Egypt Independent*, 8 December 2012, see <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>. For analysis of Article 219, see Lombardi & Brown.

¹¹³ Haaretz, 3 June 2013; <http://www.euronews.com/2013/07/03/egypt-constitution-suspended/>.

and suspended the new Constitution. General ‘Abd al-Fattāḥ Khalīl al-Sīsī, Minister of Defense, called for presidential and parliamentary elections, the establishment of a panel to review the constitution, and a national reconciliation committee. ‘Adlī Maḥmūd Maṣṣūr, President of the Supreme Constitutional Court, was sworn in as an interim president to conduct the affairs of state until a new president is elected. On July 9, Dr. Ḥāzīm ‘Abd al-‘Azīz al-Bablāwī, a former finance minister, was named Egypt’s prime minister, and Dr. Muḥammad al-Barādhiī, the former head of the International Atomic Energy [IAEA], was named Egypt’s vice president for foreign affairs.

It has been reported that the interim President Maṣṣūr is considering the dissolution of the upper house of the parliament and the preparation for new elections for the presidency and the parliament. He has declared that Egypt will be a secular democratic state with no discrimination on grounds of religion and sex although the status of the *sharī‘a* as a source of law in the Constitution will remain intact. Clearly, it is too early to assess the changes in the position of the *sharī‘a* in Egypt.¹¹⁴

Ḥamās has been strongly influenced by the Egyptian MB.¹¹⁵ The experience it has accumulated in Gaza since 2007 may provide a notion as to what might have been expected with regard to the reinstatement of the *sharī‘a* in Egypt had the Muslim Brothers managed to rule the country.¹¹⁶ While taking into consideration the secular agenda of the Palestinian national movement, Ḥamās has adopted a pragmatic policy, opting for gradual Islamization of Gaza’s legal system. Thus Yūsuf Rizqa, political advisor to Ismā‘īl Haniyya, senior political leader of Ḥamās and Prime Minister of the Gaza Strip since 2006, announced (May 2010): “The government believes in a political spectrum without imposition of Islamic rule on the people. Our task is not to establish an Islamic state. There is no strategic plan to implement *sharī‘a*, either gradually or comprehensively. The time is not right, and [when it is] the matter should be decided by a public referendum.”¹¹⁷ However, there is ample evidence that Ḥamās is moving rapidly toward reinstatement of the *sharī‘a*: Islamic norms have been introduced into statutory legislation, a section of the judiciary that is based on arbi-

114 For further details, see *Ahram Online*, 2, 3, 6, 7 and 9 July 2013; *Haaretz*, 4, 7, 8 and 10 July 2013; CBS/AP 3 July 2013.

115 Unless otherwise indicated, this section is based on Pelham 2009.

116 Suffice to say that Egypt’s new constitution reflects in large measure the agenda of the MB and Salafists, and that President Mursī dismissed the Attorney General and caused the untimely retirement of some 3000 judges in an attempt to replace them with judges associated with Islamist groups, thus preparing the ground for taking control of the SCC (Tzoreff). The reasons for the MB’s political failure are beyond the scope of this article.

117 Pelham 2011, 15.

tration is undergoing a process of Islamization, and judges are instructed to ignore English and Israeli statutes and to apply the *sharī'a* instead. Islamic banks and insurance companies that do not charge interest have been established, and *zakāt* tax is collected from business companies.¹¹⁸ Both the *da'wa*, the missionary arm of Ḥamās, and the religious volunteers (*mutatawwi'īn*), strive to enforce observance of religious commandments and public morality. The League of Muslim Scholars is in charge of issuing *fatwās* on daily problems.¹¹⁹

15 Summary and conclusion

If the *sharī'a* is to be reinstated, several conditions must be met: An authoritative religious scholar well-versed in the *sharī'a*, fully qualified to exercise *ijtihād*, capable of drafting a new legal methodology, highly motivated, determined, and enjoying the support of both the political authority and the public. If these conditions are met, one may expect a new version of the *sharī'a* totally different from the traditional one. Created by qualified scholars (*'ulamā'*), it will continue to be a "jurists' law," but its image as a divine law will probably be diminished because of the application of human doctrines or mechanisms, such as public welfare and "governance in accordance with the *sharī'a*," alongside traditional sources of law. The possibility that the Iranian model for reinstating the *sharī'a* will be adopted by Sunni states cannot be ruled out.¹²⁰ *Ijtihād* by qualified *sharī'* scholars within a parliamentary framework will most likely serve as the main instrument for the elaboration of the law, although the development of the *sharī'a* by independent scholars outside the establishment cannot be ruled out. Moreover, statutory *ijtihād* will enable scholars to Islamize the existing legal

118 In 2009, the Parliament considered introducing amputation as punishment for theft; see Issacharoff 2009.

119 In recent years, Orthodox Jews in Israel have endeavored to strengthen the position of Jewish law in the state legal system. Since 2005, statutory courts of arbitration for resolving financial disputes in accordance with Jewish law operate alongside the state judiciary (Hofri-Winogradow, 65 and *passim*). In 2010, a bill extending the jurisdiction of the Rabbinical courts to financial disputes, subject to the parties' consent, was submitted to the Knesset. Stern strongly believes that this may bring an end to the monopoly of the state courts in civil claims, the privatization of the civil law and, in its wake, the disintegration of the social fabric in Israel (Stern 2010). In 2009, former Justice Minister Prof. Ya'akov Neeman expressed (in a closed forum) the hope that Torah law (the Law of Moses) will gradually be binding in the State of Israel (*Haaretz*, 8 December 2009).

120 Cf. Hatina.

corpus, either by bringing it into conformity with fundamental principles of the *sharī'a* or by applying *sharī'* mechanisms in statutory legislation.

If the aforementioned conditions are not met, most Middle Eastern countries will experience an increasing tendency toward nationalization of the *sharī'a*, in which case Islamic law will cease to be a jurists' law. Indeed, even the last stronghold of the *sharī'a* – religious observance – is gradually giving way to reform legislation.¹²¹ Domains of the *sharī'a* that do not undergo codification will continue to engage *muftīs* and jurists intellectually, though probably with little practical effect in daily life.¹²²

The choice between the reinstatement of the *sharī'a* by its authorized exponents and its nationalization by the state involves a value judgment and hence should be left exclusively to the discretion of the Muslim community.¹²³

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121 Cf. Peters 2003, 93-4.

122 Cf. *ibid.*, 91.

123 Cf. *ibid.*, 92f.

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